



DEPARTMENT OF LAW  
OFFICE OF THE  
**Attorney General**  
STATE CAPITOL  
Phoenix, Arizona 85007

JOHN A. LASOTA, JR.  
ATTORNEY GENERAL

July 7, 1978

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**ARIZONA ATTORNEY GENERAL**

Mr. Ronald Greenhalgh  
Graham County Attorney  
Graham County Courthouse  
Safford, Arizona 85546

Re: 78-137 (R78-79)

Dear Mr. Greenhalgh:

Your letter of March 17, 1978, asks for our opinion as to whether A.R.S. § 38-296 requires that a county attorney whose term ends in 1980 resign in order to be eligible for nomination and election to the office of Judge of the Superior Court in 1978. Our research of the law persuades us that the issue cannot be resolved without judicial action.

A.R.S. § 38-296(A) provides:

No incumbent of an elective office, whether holding by election or appointment, shall be eligible for nomination or election to any office other than the office so held, nor shall the nomination papers of such incumbent be accepted for filing.

A.R.S. § 38-296(D) provides:

A person violating any provision of this section is guilty of misfeasance in office and the office held by such person shall be declared vacant.

It is beyond dispute that if A.R.S. § 38-296 applies, the county attorney described above should resign prior to filing nominating papers for County Judge. Should the county attorney not resign, A.R.S. § 38-296(D) would require the vacation of his office at the time of filing judicial nominating papers.

The question remains whether A.R.S. § 38-296 violates the Arizona or United States Constitutions. We first examine violation of the Arizona Constitution. Article 6, Section 22 of the Arizona Constitution specifies

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the qualifications for judges of the Superior Court. That section reads:

Judges of the superior court . . . shall be at least thirty years of age, of good moral character and admitted to the practice of law in and a resident of the state for five years next preceding their taking office.

Whitney v. Bolin, 85 Ariz. 44, 330 P.2d 1003 (1958) spoke to a legislative attempt to add qualifications to a constitutional office. In Whitney a Superior Court Judge filed nominating papers for the position of Supreme Court Justice. Petitioner Whitney thereupon claimed that A.R.S. § 38-296 mandated a vacancy on the Superior Court. The Arizona Supreme Court rejected this conclusion. Justice Struckmeyer speaking for the court stated that:

It is well established that where a state constitution provides for certain officials and names the qualifications, the Legislature is without authority to prescribe additional qualifications unless the Constitution further, either expressly or by implication, gives the Legislature such powers. 87 Ariz. 44, 47.

This principle was recently reaffirmed in State ex rel. Sawyer v. LaSota, \_\_\_ Ariz. \_\_\_ (1978). The Whitney court, however, carefully qualified its holding. After noting that the conclusion quoted above was "fortified" by Article 6, Section 11 of the Arizona Constitution,<sup>1</sup> the Court stated:

We do not at this time pass upon the effect of this statute on any other public office.

But a significant difference between the facts in Whitney and the facts in the present case exists. In Whitney both the office sought (Supreme Court Justice) and

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1. "Judges of the Supreme Court and Judges of the Superior Court shall not be eligible to any office or public employment other than a judicial office or employment, during the term for which they have been elected." In modified form the provision currently appears as Art. 6, § 28 of the Arizona Constitution.

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the office held (Superior Court Judge) had qualifications set by the Constitution. Therefore, whether the court was asked to bar Supreme Court candidacy or to remove the Superior Court incumbent, A.R.S. § 38-296 imposed an additional qualification or disqualification on a constitutional office whose qualifications cannot be expanded upon by the Legislature. Such is not the case in the present matter. The office of the County Attorney is created by Art. 12, § 3 of the Arizona Constitution. Art. 12, § 4 provides that the "duties, powers, and qualifications" of the county attorney "shall be as prescribed by law." Therefore, we believe that a court would conclude that A.R.S. § 38-296(A) cannot bar a County Attorney from seeking the post of Superior Court Judge. We also recognize however that a court may conclude that A.R.S. § 38-296(D) would be a constitutionally permissible disqualification of a County Attorney, as County Attorney, an office whose qualifications are validly set by the Legislature.<sup>2</sup>

Finally for reasons stated in Op. Atty. Gen. 78-37, we feel that A.R.S. § 38-296 does not violate the first amendment of the United States Constitution.<sup>3</sup> And we further believe that much of the reasoning in the en banc opinion of the Fifth Circuit in Morial v. Judiciary Commission, 565 F.2d 295 (5th Cir. 1977) may be pertinent to an assessment of the Arizona constitutional issue.

In summary we believe that the Whitney case raises a reasonable ground to question the application of the terms of A.R.S. § 38-296 as applied to the qualifications for Superior Court Judges. However, we feel that factors distinguishing the present controversy from Whitney do not allow of an automatic application of the Whitney principle in this situation. Therefore since the issue involves significant questions regarding the qualifications of public officials and the potential consequences to a county attorney who files nominating petitions without resigning

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2. A court might also consider that the present case is not also governed by current Art. 6, § 28 of the Constitution authorizing judges to seek other judicial office.

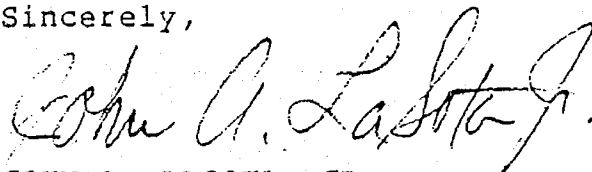
3. To the extent Op. Atty. Gen. 78-37 suggests that A.R.S. § 38-296 would control constitutional officer qualifications under all circumstances provisions of the Arizona Constitution, that opinion is modified.

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from office are so dire we believe these questions should be  
resolved by courts.

Sincerely,

A handwritten signature in cursive script, reading "John A. Lasota, Jr.", written in dark ink.

JOHN A. LASOTA, JR.  
Attorney General

JAL:kk